Ensui Gudul @ Godol v Suin @ Abdul Samad bin Dongkiris & Ors

HIGH COURT (KOTA KINABALU) — SUIT NO K22–20 OF 2008
ABDUL RAHMAN SEBLI J
25 AUGUST 2010

Native Law and Custom — Land dispute — Customary rights over land — Plaintiff claimed beneficial ownership of land inherited from late mother — Whether plaintiff's beneficial interest in land could be defeated by defendants' claim for native customary rights — Sabah Land Ordinance ss 13 & 88

After the demise of the late Butang bt Banawas, her son Ensui Gudul @ Godol ('the plaintiff') applied for the issuance of a notice for the purpose of administering the estate of his late mother and a notice for the purpose of claiming his inheritance, which was the beneficial ownership of a piece of land situated at Kampong Ginapas, Sabah ('the land'). The title to the land was issued to the plaintiff's late father in January 1961 for a term of 21 years. Upon expiry of the lease in 1982 the land had reverted back to the state but the plaintiff's late mother, as the widow, then applied for the renewal of the lease. As no objection was raised by any party, the application was approved and the land was registered in the name of the plaintiff's late mother. This was the plaintiff's claim for possession of the land which he claimed to have inherited from his late mother. The defendants, who are his close relatives, contended that the plaintiff could not claim possession of the land since they were in occupation and possession of the land under native customary rights ('NCR'). The defendants claimed that they had entered and occupied the land under native customary tenure after the expiry of the plaintiff's late father's title and before his late mother had applied for renewal of the lease. The defendants thus submitted that their NCR over the land had not been legally extinguished by the issuance of the title deed to the plaintiff's late mother. The sole issue in the present case was whether the plaintiff's beneficial interest in the land could be defeated by the defendants' claim for NCR.

Held, allowing the plaintiff's claim and dismissing the counterclaim with costs:

(1) The defendants were precluded from claiming any NCR or interest over the land by virtue of s 88 of the Sabah Land Ordinance (the Land Ordinance). The plaintiff's late mother's title to the land had extinguished any NCR that may have existed prior to its issuance and the plaintiff had proved his claim on a balance of probability. The cases cited by the defendants to support their contention were not relevant, in that,

in the present case the land had been alienated to the plaintiff's mother and was not state land. In any case it is settled law that NCR can be extinguished by any statutory law (see paras 9–10 & 19).

(2) Upon receiving the plaintiff's late mother's application for renewal of the lease of the land and before the new title was issued to her the Assistant Collector of Land Revenue Kota Belud had issued a notice pursuant to s 13 of the Land Ordinance. This notice was displayed at the notice board of the Kota Belud land office for a period of one month and during that period no one, including the defendants, had raised an objection or filed a claim for NCR over the land. By failing to make such a claim the defendants were deemed to have waived their NCR over the land. Thus even if the defendants were in lawful occupation of the land prior to the issuance of the title to the plaintiff's late mother, their failure to claim their rights over the land had made their occupation illegal thereafter (see paras 13–14 & 18).

[Bahasa Malaysia summary

Selepas kematian mendiang Butang Banawas, anak lelakinya Ensui Gudul @ Godol ('plaintif') membuat permohonan untuk pengeluaran notis bagi tujuan mentadbir harta pusaka mendiang ibunya dan notis bagi tujuan menuntut pewarisannya, iaitu pemilikan benefisial ke atas sebidang tanah yang terletak di Kampong Ginapas, Sabah ('tanah tersebut'). Hakmilik ke atas tanah telah dikeluarkan kepada mendiang bapa plaintif pada Januari 1961 untuk tempoh 21 tahun. Apabila tamat pajakan pada tahun 1982, tanah tersebut dikembalikan kepada kerajaan negeri tetapi mendiang ibu plaintif, sebagai balu, telah memohon pembaharuan pajakan. Oleh kerana tiada bantahan daripada mana-mana pihak, permohonan tersebut dibenarkan dan tanah tersebut didaftarkan di bawah nama mendiang ibu plaintif. Ini adalah tuntutan plaintif bagi milikan ke atas tanah tersebut yang mana dihujahkan telah diwarisi daripada mendiang ibunya. Defendan-defendan, saudara terdekat plaintif, menghujahkan bahawa plaintif tidak boleh menuntut milikan memandangkan penghunian dan milikan tanah tersebut adalah pada mereka di bawah hak-hak adat masyarakat asli ('HAMA'). Defendan-defendan menghujahkan bahawa mereka memasuki dan menghuni tanah tersebut mengikut tempoh adat masyarakat asli selepas tamatnya hakmilik mendiang bapa plaintif dan sebelum mendiang ibunya membuat permohonan bagi pembaharuan pajakan. Defendan seterusnya menghujahkan bahawa HAMA ke atas tanah tersebut belum lagi terhapus secara sah dengan pengeluaran suratikatan hakmilik kepada mendiang ibu plaintif. Isu utama di dalam kes ini adalah sama ada kepentingan benefisial plaintif ke atas tanah tersebut boleh digagal dengan tuntutan defendan di bawah HAMA.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas dengan kos:

(1) Defendan-defendan adalah terhalang daripada membuat tuntutan

hak-hak adat masyarakat asli ke atas tanah tersebut mengikut s 88 Ordinan Tanah Sabah ('Ordinan Tanah'). Hakmilik mendiang ibu plaintif ke atas tanah telah mengalahkan HAMA kerana telah ia telah wujud sebelum pengeluarannya lagi dan plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian. Kes-kes yang dinyatakan oleh defendan-defendan untuk menyokong hujahan mereka adalah tidak relevan, yang mana, di dalam kes ini, tanah tersebut telah diberimilik kepada mendiang ibu plaintif dan bukan tanah kerajaan negeri. Dalam apa jua keadaan, adalah undang-undang tetap bahawa HAMA boleh dikalahkan oleh mana-mana undang-undang statutori (lihat perenggan 9–10 & 19).

(2) Apabila menerima permohonan pembaharuan pajakan tanah mendiang ibu plaintif dan sebelum hak milik baru dikeluarkan kepadanya, Penolong Pemungut Hasil Tanah Kota Belud telah mengeluarkan notis menurut s 13 Ordinan Tanah. Notis ini telah dipaparkan di papan kenyataan Pejabat Tanah Kota Belud untuk tempoh satu bulan dan dalam tempoh tersebut, tiada sesiapa, termasuk defendan-defendan, yang membangkitkan bantahan atau memfailkan tuntutan HAMA ke atas tanah tersebut. Kegagalan untuk membuat tuntutan, defendan-defendan dikatakan telah mengetepikan HAMA ke atas tanah tersebut. Oleh itu, walaupun defendan-defendan menghuni tanah tersebut secara sah sebelum pengeluaran hak milik kepada mendiang ibu plaintif, kegagalan mereka untuk menuntut hak-hak mereka ke atas tanah tersebut menyebabkan penghunian mereka salah di sisi undang-undang (lihat perenggan 13–14 & 18).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158; [1998] 2 CLJ 665, CA (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)

Narinder Kaur v Deyoh Opong & Ors [1997] MLJU 169; [1997] 2 CLJ 895, HC (refd)

Ng Kon Yu v Sakim bin Saiking & Ors [2006] 3 MLJ 533, HC (refd)

Ng Kon Yu v Sakim bin Saiking & Ors [2001] 4 MLJ 140; [2001] 1 LNS 37, HC (refd)

Superintendant of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221; [1997] 1 CLJ 541, FC (refd)

Legislation referred to

Administration of Native and Small Estates Ordinance 1941
Rules of the High Court 1980 O 89
Sabah Land Ordinance ss 13, 15, 88

Suzeianah Saulkmen (Mahap, Jelani & Co) for the plaintiff.
Yunof Maringking (Trevor Maringking with him) (Maringking & Co) for the defendants.

Abdul Rahman Sebli J:

THE CLAIM

[1] The plaintiff's claim is for possession of a piece of land known as CL035319558 situated at Kampong Ginapas, Rosok, Kota Belud Sabah ('the said land') which he inherited from his late mother Butang bt Banawas. The defendants who are his close relatives contended that he cannot inherit the said land alone as they have been in lawful occupation and possession of the said land under native customary rights and which rights were not extinguished by the issuance of the new title to the late Butang bt Banawas.

THE ISSUE

[2] A number of issues were raised by the defendants but in my view the determinative issue is whether the plaintiff's beneficial interest over the said land can be defeated by the defendants' claim for native customary rights.

BACKGROUND FACTS

[3] The said land was previously issued with Title No CL035263159 in January 1961 in the name of the plaintiff's late father Gudul bin Sampit for a term of 21 years exclusively for the grazing of cattle. Upon expiry of the lease in 1982 the land reverted back to the state. The plaintiff's late mother then applied for renewal of the lease. Her application was supported by the Kota Belud Native Court which confirmed that being the widow of the late Gudul bin Sampit she was entitled to inherit the land. No objection was raised by any party to the application and so it was approved. A new Title No 035319558 was then issued in her name.

[4] After the demise of the late Butang bt Banawas on 30 November 2003 her son the plaintiff applied to the Kota Belud Native Court for the issuance of two Schedule 3 (*Jadual 3*) notices under the Administration of Native and Small Estates Ordinance 1941, the first for the purpose of administering the estate of his late mother and the second for the purpose of claiming inheritance. The operative part of the second Schedule 3 reads as follows:

> HARTA TANAH C.L. 035319558 MILIK MENDIANG BUTANG BANAWAS KP. 460510–12–5418 DIWARISKAN KEPADA ENSUI BIN GUDUL @ GODOL KP. 720405–12–5967 SEORANG SAHAJA.

[5] It was the plaintiff's contention that the second Schedule 3 conferred inheritance rights on the plaintiff and that he not only became the administrator but also the beneficial owner of the said land.

SECTION 88 OF THE LAND ORDINANCE

[6] There can be no argument that since the said land is registered in the name of the plaintiff's late mother, the provisions of s 88 of the Sabah Land Ordinance ('the Land Ordinance') come into play. Section 88 of the Land Ordinance provides as follows:

> No new title and no dealing with, claim to or interest in any land except land still under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this part.

[7] In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 Edgar Joseph Jr FCJ in delivering the judgment of the court said:

> However, s 88 which emphasises the paramount importance of registration in accordance with Part V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land does imply the basic Torrens concept that title to or interest in land vests and divests only upon registration.

[8] The decision in *Borneo Housing Mortgage Finance Bhd* was relied upon by Linton Albert J in *Ng Kon Yu v Sakim bin Saiking & Ors* [2006] 3 MLJ 533. In that case the defendants in resisting the registered owner's application for possession under O 89 of the Rules of the High Court 1980 contended that they could not be dislodged from the land because they had a licence to remain indefinitely on the land or alternatively had acquired native customary rights over the same by virtue of s 15 of the Land Ordinance. In allowing the registered owner's claim for possession the learned judge said:

A The licence and the native customary rights which the defendants have allegedly acquired cannot, therefore, conceivably subsist upon issuance of the titles to the land in 1995 and 1996. The clear and unambiguous words used in s 88 render any claim to or interest in the said land invalid.

B

[9] In *Narinder Kaur v Deyoh Opong & Ors* [1997] MLJU 169; [1997] 2 CLJ 895 Ian HC Chin J held, inter alia, that unless the issue of title to the land could be assailed, the title had extinguished whatever native customary rights that may have existed prior to its issuance.

C

[10] The defendants' position is no better than the position of the defendants in *Ng Kon Yu* and *Narinder Kaur*. They are therefore precluded by s 88 of the Land Ordinance from claiming any native customary right or interest over the said land. Learned counsel for the defendants cited *Kerajaan* D *Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 (CA); *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158; [1998] 2 CLJ 665 (CA); *Superintendant of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509(FC) for the E broad proposition that courts in Malaysia recognise that natives have rights at common law over land vested in the state and that such right existed until it has been extinguished by any statutory law. With due respect to learned counsel none of the cases is relevant as in all those cases the lands are state lands unlike the present case where the land in dispute has been alienated to the plaintiff's F late mother. In any case the decisions recognise that native customary rights can be extinguished by any statutory law.

[11] This in my view disposes of the plaintiff's claim. But for completeness G I shall deal with the defendants' claim that they had entered and occupied the said land under native customary tenure after the expiry of Title No CL035263159.

CLAIM PROCEDURE FOR NATIVE CUSTOMARY RIGHTS

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[12] The legal position is that when an application for alienation of state land is made by any person, any other person claiming to have native customary rights over the land must make such claim within the period specified by the collector. This is the procedure prescribed by s 13 of the Land I Ordinance, which reads:

> Upon the receipt of any application for the unalienated country land it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered

documentary title to make or send in a statement of his claim within a date to be specified in the notice. *If no claim is made the land shall be dealt with as if no such rights existed*. (Emphasis is added.)

[13] In the instant case, upon expiry of CL035263159 in 1982 the said land became state land, meaning to say it reverted back to its original status as unalienated land. After receiving the application for renewal of the lease by the plaintiff's late mother and before the new title was issued to her the Assistant Collector of Land Revenue Kota Belud had issued a notice pursuant to s 13 of the Land Ordinance. The notice was displayed at the notice board of the Kota Belud Land Office for a period of one month. During that period no one, including the defendants came forward to make an objection or file a claim for customary rights over the said land.

[14] Therefore by virtue of s 13 of the Land Ordinance it is presumed that no native customary rights existed over the said land. The purpose behind s 13 of the Land Ordinance is to ensure that native rights over native customary land are protected but such rights must be claimed once the notice under s 13 is issued. The defendants failed to do so and it is too late in the day for them to make such claim now. By failing to make a claim the defendants are deemed to have waived their customary rights over the said land. The decision of the Federal Court in *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221; [1997] 1 CLJ 541 must be read in this context.

[15] Learned counsel for the defendants contended that s 13 of the Land Ordinance had not been complied with in that no evidence was adduced to prove personal service of the s 13 notice on the defendants. It therefore follows according to learned counsel, that the defendants' right over the said land has not been legally extinguished by the issuance of the title deed to the plaintiff's late mother.

[16] In my view there is no requirement for personal service of the s 13 notice. To construe otherwise would be to read something into s 13 which is not there. The purpose of the notice is to notify the general public (as opposed to any individual person) that an application for alienation has been made and that if any person has any customary rights claim in the land he is to make or send in his statement of claim within the specified period.

[17] The decision of the High Court in *Ng Kon Yu v Sakim bin Saiking & Ors* [2001] 4 MLJ 140; [2001] 1 LNS 37 cited by counsel for the defendants must be confined to its own peculiar facts and circumstances. In that case it is clear that the Beluran Land Office knew the identity of the persons claiming native customary rights over the disputed land, hence the learned judge's view that they needed to be notified of the land application. In addition to that it was also

the finding of the learned judge that those responsible for handling the land applications did not do their work properly and had sent the defendants on a wild goose chase. That is not the case in the present action.

[18] Thus, even if the defendants were in lawful occupation of the said land prior to the issuance of the title to the plaintiff's late mother, their failure to claim their rights over the said land makes their occupation illegal thereafter. The title being registered in the name of the plaintiff's mother the defendants are no better than trespassers on the said land and have no right to remain there.

CONCLUSION

[19] On the evidence I am satisfied that the plaintiff has proved his claim on the balance of probability. Judgment was therefore entered for the plaintiff in terms of the statement of claim. The counterclaim was dismissed with costs.

Plaintiff's claim allowed and counterclaim dismissed with costs.

Reported by Kohila Nesan